

## Chapter 2

# Theism and Human Rights

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In an article on “Culture, Religion, and Gender” the Israeli professor of law Frances Raday (b. 1944) takes a clear stance with regard to religion and human rights. Human rights as we know it today, she writes, “is a product of the shift from a religious to secular state culture at the time of the Enlightenment in eighteenth-century Europe” (Raday 2003: 663). The eighteenth century was a time when the religious paradigm was replaced by secularism, communitarianism and individualism; and status by contract. According to Raday the modern concept of human rights is the child of secularism. She quotes with approval the historian Yehoshua Arieli (1916–2002) who wrote:

The secular character of the normative system embodied in human rights doctrine is essential to its comprehension. All its premises, values, concepts and purposes relate to the homocentric world and to ways of thought freed from transcendentalist premises and from the jurisdiction of religious authority. And so, the development of the doctrine of human rights is inseverably connected to the process of secularization of Western society ... (Raday 2003: 663)

The vision of Raday and Arieli means there is a clash between human rights culture and classical theism as it manifests itself in the great monotheistic traditions of Judaism, Christianity and Islam. And this conflict will by some be interpreted as a specification of a wider conflict, namely that between modern scientific culture and ancient religion (Menuge 2001).

This view is not universally shared, to say the least. There are many authors who point out the continuous relevance of the premodern worldview of theism for our contemporary morals and culture. In *The Bible Now* Richard Elliott Friedman and Shawna Dolansky tell us that many people still study the Bible as a foundation of morality and virtue (Friedman and Dolansky 2011: xi). Reading the books of Karen Armstrong (b. 1944) or listening to a recent convert to Catholicism such as Tony Blair (b. 1953) one gets the impression that all our modern enlightened values are not only derived from religious sources but dependent thereon (Armstrong 2007, 2009a, 2009b; Blair 2010; Griffiths 2011).

There seems to be a *prima facie* contradiction between two groups of scholars: those who see a contradiction between modern human rights and theism and those who consider human rights to be a product of theism and dependent on it (Copan 2011).

In: Angus J.L. Menuge, ed., *Legitimizing Human Rights: Secular and Religious Perspectives*, Ashgate, Farnham, Burlington 2013, pp. 33-57.

But soon things turn out to be more complicated. Reading Elliott Friedman's and Dolansky's *The Bible Now* more closely we stumble upon sentences like "the Bible has often been misused" (Friedman and Dolansky 2011: xiii) and "people used the Bible for harm" (ibid.: xii).

Apparently, according to the authors of *The Bible Now* there is a "use" of the Bible. And "using" the Bible teaches us "the Bible is an extraordinary repository of remarkable stories, exquisite writing, and revolutionary laws" (ibid.: xi). But there is also a "misuse" of the Bible. This is the case when the Bible is used for "harm."

That means there is a third position about the relationship between theism and human rights. Theism can be "used" as a basis for harmful practices, but theism can also be used for good. The authors even tell us when that misuse is in play: when the Bible is used for "harm."

This puts us on the track of further questions like the following: is "harm" the only criterion we have at our disposal to speak of "misuse" of the Bible or are there any other criteria? Answers to this question might prove helpful because there are many discussions nowadays where freedom of religion as interpreted by orthodox religious people and human rights doctrine seem to clash. Theism seems at loggerheads with human rights in questions concerning the sanctification of violence (jihad, crusades; Kelsay 2009), male and female circumcision (Tamir 1996; Putzke et al. 2008), unstunned ritual slaughter of animals (Lerner and Rabello 2006/2007), homosexuality (Wolfenden Report 1963), the death penalty (Beckwith 2002) and many other subjects.

It is the aim of this chapter to explore this field. I want to develop criteria for the legitimate "use" of religion within the context of human rights. To illustrate my argument it is helpful to treat one of the vexing issues around the legal definition of religion. Here there is more than one option, but I choose the issue of unstunned ritual slaughter, more particularly the question whether the exemption of the general obligation to stun animals before slaughter can be justified on the ground of freedom of religion.

In the pages that follow I will first give an idea of the structure of human rights law with regard to the freedom of religion. Subsequently I will show why unstunned ritual slaughter became an issue in the Netherlands. Finally I will try to argue that unstunned ritual slaughter does not necessarily have to be considered a "religious" issue. At the end of this chapter I will present some guidelines for the legal acknowledgement of religion.

### **Human Rights in Treaty Law**

To understand the aim of this exercise it is necessary to say something about the way human rights are protected in human rights treaties. Reading these human rights treaties will make clear that the question "what is religion?" is far from academic. This is not the case because "religion" and "religious practices" enjoy a special legal protection in the constitutions of most European states and also in

international human rights treaties where freedom of religion is accepted as a basic or fundamental right.

The European Convention on Human Rights includes Article 9. This Article has two paragraphs and both are important with regard to the protection of freedom of religion. The first paragraph goes as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance.

The crucial word is "religion." Like "thought" and "conscience," religion enjoys a special protection. Whether "religion" deserves that protection on an equal par with "thought" and "conscience" is not something I will address in this chapter. I will take as my point of departure that there is "freedom of religion" as a constitutional and human right. Those who argue that there should be no separate provision for freedom of religion but only for freedom of speech or freedom of conscience will consider my argument beside the point. But I will take for granted that for historical and intrinsic reasons there is special protection for religion. Subsequently, I will try to develop criteria of how to deal with that freedom of religion. If an idea or a practice is not recognized as "religious" in nature there is no chance of having this idea or practice protected as religious freedom under a human rights regime. But if it is, the person invoking that freedom can claim a special protection of his beliefs and manifestation of that belief.

But once this hurdle is taken, there is another in the second paragraph of Art. 9.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

### **On Limiting the Freedom of Religion**

As follows from the foregoing paragraphs: human rights are not absolute. Most of them are limited, and those limitations have been laid down in human rights treaties. Let us focus on the limitations on the freedom of religion as laid down in paragraph 2 of Article 9 of the European Convention on Human Rights. How are we to read those clauses?

In my interpretation the clearest and least misleading way to read these limitations is to say that they express *additional necessary conditions to have freedom of religion effectively protected*. What the whole Article on the freedom of religion teaches us (in both the European Convention and also the International Convention) is that once an idea or practice is recognized as "religious," this is

only a *necessary* (and not a *sufficient*) condition for an effective protection of this idea or practice under a human rights regime. To have that effective protection of a human right fully realized, another condition has to be fulfilled, namely that the expression or manifestation of this religious idea or religious practice does not violate (i) the law;<sup>1</sup> (ii) does not contravene democratic standards, and (iii) does not violate certain standards of public order, health or morals or the rights and freedoms of others.

### Unstunned Ritual Slaughter

Now I will be somewhat more specific about the matter of slaughtering animals. In this chapter I want to reflect on the concept of “religion”, as used in Article 9 of the European Convention. But I want to do this in relation to a much discussed religious practice lately, namely unstunned ritual slaughter of animals. The question is this. People use meat for consumption. There is much to say about this habit, but this is not the topic of my chapter (Regan 1980; Walters and Portmess 1999). People eat meat and we will take that for granted. But at the same time people want to assure that animals that are about to be slaughtered experience only a minimum of stress and pain during the process (at least, that is often presented as the rationale behind the legislation on humane slaughter). For that reason, many countries adopted legislation that prescribes “stunning” before the animal is killed. Only “stunned” ritual slaughter was considered to be “humane” (Welty 2007; Miller 1959; Mariucci 2008).

This legislation is challenged by religious groups (Jewish and Muslim) claiming that stunning violates their freedom of religion. Unstunned ritual slaughter is for example prescribed for the kosher *schechita*. There are also some Muslim groups who claim that halal meat requires unstunned ritual slaughter. So the question is: can those exemptions from general legislation about the slaughtering of animals be acknowledged as the expression of a religion?

Although most countries accept exemptions from the general prescription of stunning before slaughter, these exemptions are challenged by animal rights activists and veterinarians who point out that unstunned ritual slaughter is not a very animal-friendly practice. In May 2012 the British veterinarian Professor Bill Reilly, a former president of the British Veterinary Association, caused some controversy with an article in *Veterinary Record*, a publication of that same organization. Reilly criticized the—in his opinion—“unacceptable” rise in the number of animals killed in ritual slaughter. Reilly said: “In my view, the current situation is not acceptable and, if we cannot eliminate non-stunning, we need to keep it to a minimum” (BBC News 2012b). He proposed two things: (i) restricting the use of halal and kosher meat to those communities that require it

<sup>1</sup> Which can be problematic, because we have countries where, for example, apostasy is illegal though it seems integral to freedom of religion.

for their religious beliefs and (ii) convincing those religious communities of the acceptability of stunned alternatives.

Reilly provoked many negative reactions from the religious communities he was accused of having attacked. Simon Cohen of Shechita UK contested the scholarly information that Reilly tried to convey. His research was “deeply flawed,” according to Cohen. Dr. A. Majid Katme from the Islamic Medical Association joined Cohen in criticizing the assumption that science had proven that unstunned ritual slaughter was more painful for animals than stunned slaughter. She made an addition, however, discrediting the implicit religious criticism that she thought was inherent in Reilly’s stance. She said: “It is arrogant for someone who is not a Muslim to presume that he can teach us the practice of our faith” (ibid.). But Reilly got support from organizations concerned with animal welfare. Joyce D’Silva, from the charity organization Compassion in World Farming, said: “Judaism and Islam believe that animals are creatures of God; science tells us that they are sentient beings, who can suffer” (ibid.).

These are all indications that the issue of ritual slaughter is highly controversial and this discussion is not likely to abate in the coming period. In the Netherlands there was a discussion on the same topic when in 2011 a legislative proposal was launched by The Party for the Animals (Tweede Kamer, Lower House of Parliament, 2009–10, 31 571, nr. 2). On June 28, 2011 in the lower house of the Dutch Parliament an overwhelming majority of 116 against 30 votes opted in favor of a bill making it obligatory to stun animals before slaughter. The exemption from the general obligation for religious groups would be eliminated from Dutch law.

I will come back to the Dutch discussion on this topic later in this chapter. Let me start with the general rule on stunning according to Dutch law: Animals to be slaughtered are required to be stunned before slaughter. But in the Dutch Health and Welfare Law (“Gezondheids- en Welzijnswet”), there was an Article 44, paragraph 3, making an exemption for religious ritual slaughter: “Slaughtering animals without pre-stunning according to the Israelitic or Islamic rites is allowed.” The proposal for legislation by the Party of the Animals would change this. They proposed to change the Article in the legal code cited in the following manner: “Slaughtering animals according to the Israelitic or the Islamic rites is only allowed when the animal is stunned.” This topic gained international attention. BBC News Europe reported: “Dutch MPs effectively ban ritual slaughter of animals” (BBC News 2011). But only a few months later, on December 14, 2011 the Dutch Senate decided to freeze its vote against the ban on unstunned ritual slaughter (Eerste Kamer, Bedwelmig bij ritueel slachten, 31571, December 13, 2011).

### **The Importance of this Debate**

Why is this debate on unstunned ritual slaughter important at all? One thing is certain: it is not because unstunned ritual slaughter is the most important issue regarding animal welfare. There are countless other issues that deserve more

attention from the perspective of animal rights or animal welfare (Van den Berg 2012). If we would consider legislative measures concerning animal welfare, a legislative bill making it a criminal act to consume meat would be far more effective. But that is not the point of this chapter. This is about animal welfare as such. What my intention is, is to analyze one specific issue where freedom of religion (or religion) gets into conflict with the modern secular morality of human rights, more in particular with the utilitarian aim to increase the happiness in this world. The topic of unstunned ritual slaughter is one of the many issues I could have selected to make my point. My point is this: in a modern liberal democracy we can accept freedom of religion only up to a certain degree. Freedom of religion can be accepted insofar as it is in harmony with generally accepted human rights and moral standards. What I will try to do is to develop criteria that judges and legislatures can use in order to decide where freedom of religion is legitimate and where it is not. For this purpose the discussion on unstunned ritual slaughter proved a fruitful case.

For the moment, the discussion in the Netherlands may have come to a halt. But the debate brought us into the heart of the discussion about the notion of "religion." In most discussions on this subject unstunned ritual slaughter is presumed to be a "religious" prescript. With "presumed" I mean that many commentators do not contest the "religious nature" of this practice. So it is often taken for granted that the first hurdle (paragraph 1 of Article 9 ECHR and paragraph 3 of Article 18 ICCPR) for the acceptance of this religious freedom is lightly taken. What the discussion is focused on subsequently, is on the question whether there are good reasons to *limit* this religious practice (on the basis of paragraph 2 of Article 9 ECHR; Haupt 2007).

That common way of framing the dilemma is unfortunate to my mind. The thesis that I want to develop in this chapter is that there are good reasons to contest the recognition of unstunned ritual slaughter as being "religious" *at all*. We should at least consider, for example, whether it is not rather a "cultural" practice. Or perhaps it is an "ideological" custom instead of a "religious" one. So according to the approach indicated in this chapter the question is not whether those presumed religious practices can be subject to limitations as are "prescribed by the law." Nor is it whether those limitations are "necessary in a democratic society," or whether those limitations are required "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." No, the more fundamental question is: is it "religious" in the first place? It is the first paragraph of Article 9 ECHR we must be concerned with, not the second.

This indicates that we seriously have to ponder the question what the word "religion" means in the context of human rights declarations. An important question in that context is: does this mean the same thing as the word "religion" in ordinary parlance? Or is the *legal* meaning of the word significantly different? And if so, *in what sense* is the legal meaning of religion different from religion in, for example, a social sense?



One of the most fundamental insights of the theory of interpretation is that context matters. If something is accepted as “religion” in the *social* sense, does that necessitate us to accept it as “religion” in the *legal* sense? (Fuller 1958). And if there is a difference, where does that difference lie? Is it possible, for example, to sketch the contours of a workable definition of “religion” in the legal sense?

As will be made clear in the course of my argument, this is an important question that has a much wider significance than the discussion of ritual slaughter. Whether we like it or not (and some people do not seem to like it) we simply must confront the most fundamental question: what is religion? Once this question is answered it will be clear that the answer is relevant not only for the matter of unstunned ritual slaughter but for many other controversial cases where the interpretation of religion is crucial.

### What Does “Religious” Mean?

Now *prima facie* this focus on the meaning of the word “religion” may not seem a very promising and relevant angle to approach the matter of ritual slaughter. Is it not roughly clear what we mean by “religion”? And rituals, not only around slaughtering animals but other occurrences (think of male circumcision, for instance) as well, seem indubitably part of “religion,” do they not? Yet, if one goes a little deeper into the matter of “religion” it appears a much more elusive concept than some of the other phenomena mentioned in the European Convention on Human Rights. One of the claims of this chapter is that although it is difficult to say where the limits of “free expression” (Article 10 ECHR) should lie, there is not a protracted debate about what counts as the expression of an idea or the airing of an opinion. And although one may differ about the boundaries of the “freedom of assembly” (Article 11 ECHR), there is no heated debate about the question whether a gathering of people is really an “assembly.”

Strange though this may seem, this is different when it comes to “religion.” There is a widespread dissensus about what ideas should be considered “religious” and which of those seemingly “religious” ideas should really be categorized as “political,” “cultural,” “ideological” or simply “mad.” “Religion” is an—with apologies for using this threadbare concept—essentially contested concept in the sense that “speech” and “assembly” are not (Clack 2008; Yandell 1999; Hick 2004; Alston 1967). We should face this openly.

### The “Religiosity” of Unstunned Ritual Slaughter

This is also pertinent to the matter of ritual slaughter. Are the rules around ritual slaughter really “religious” rules? Or are they merely “cultural” and ideological?

Pablo Lerner and Alfredo Mordechai Rabello in their elaborate and highly relevant treatment of stances on ritual slaughter refer to a *fatwa* accepting stunning

(Lerner and Rabello 2006/7). The Mufti of Dehli stated in a *fatwa* in 1935 that stunning would not violate any religious prescript because stunning does not kill the animal (which would clearly contradict the Islamic prescriptions around slaughter), but only “stuns” the animal. The method indicated is referred to as “reversible electric stunning” which means that the animal can recover, and so is not dead. The Mufti stated that it is permissible to stun the animal as long as the animal does not die in the process of stunning.

A second authoritative Islamic declaration regarding ritual slaughter is that of the Rector of the Al-Azhar University of Cairo from 1982. Stunning would not make the practice unislamic. And on the Jewish sources Norman Solomon (b. 1933) writes: “Not all Jews are equally strict in their observance of kashrut (what is or is not kosher). Some Reformers reject the system entirely, stressing that the essence of Judaism is ethics, not diet ...” (Solomon 2000: 90).

These stances are, as one may expect, contested by other sources. And then the question comes up: which interpretation of religion is right? But that is a difficult question to answer, of course, and so most interpreters try to circumvent that tricky matter. That also holds true for Lerner and Mordechai Rabello. They write:

Any framework for the protection of religious beliefs and practices should not be sought in the “correct” interpretation of the religious text, especially when there is controversy. Theological arguments trying to adopt a narrow or broad interpretation afford no real solution to this problem; the concern of this Article is rather to explain why a ban on this practice (*i.e.* unstunned ritual slaughter; PC) may be seen by Muslims or Jews as being at odds with their faith. (Lerner and Rabello 2006/7: 12)

It is this approach I want to challenge in this chapter. Of course Lerner and Mordechai Rabello are right that a ban on the practice of unstunned ritual slaughter “may be seen by Muslims or Jews as being at odds with their faith,” but this cannot be decisive (Lerner 2006/7: 12). Experience teaches us that a ban on the practice of unstunned ritual slaughter is seen by *other* Muslims and Jews as perfectly in harmony with their faith. The approach by Lerner and Mordechai Rabello taking what by some Muslims or Jews is at odds with their faith would result in a kind of *laissez faire* approach towards religious practices. There will always be religious believers who proclaim some practices as required or inspired by their religion. Especially in a world of religious diversity there are myriads of religious beliefs and practices and simply all legal duties would be floating into the air once we would make compliance with the law dependent on the question whether this would not contradict some interpretation of some religion by some religious interpreter.

This is especially relevant, as I will try to show in the development of my argument, when great new moral principles are at stake, for example the principle to minimize harm and suffering not only for human animals but also for non-human animals. Simply accepting *everything* as “religion” that some people or



some religious leaders present as “religious,” although seemingly sympathetic (and according to some based on “respect” for religion or religious believers), would undermine not only the idea of fidelity to the law (Fuller 1958), but also the whole idea of freedom of religion. If religious freedom is to mean anything *at all* there must be a dividing line between what can be accepted as “religious” and what not.

Yet I am perfectly aware that the road ahead of us, not only practically but also from a theoretical point of view, is full of hurdles. What criterion should one use to accept some idea or practice as “religious”? This is no easy question to answer.

One of the criteria one could adopt is: numbers count. In other words: we need a majority or substantial minority of believers who subscribe to a certain practice. But then the question forces itself upon us: why is this relevant? Why could for example a small minority not be right? This is something we can ascertain in other areas of life as well. Take science. If it were true that numbers count, the views of Darwin, Newton, Galileo or Einstein could never have prevailed. Would not the same be true in religion? If “might is right” would be the only criterion in religion, the Catholic Church would have been right and not Luther. But apparently even a minority can present something that can become a majority opinion. Taking the perspective that only numbers count would mean that from a legal perspective the Reformation is not acknowledged as a religious movement as long as it has not established itself.

So numbers cannot be decisive. But what can?

Islam-scholar Hans Jansen (b. 1942) writes: “Freedom of religion is no license for cannibalism or headhunting. Or (suicide)terrorism. Or any form of violating the freedom of movement of others” (Jansen 2011: 198). So if you say it is your religious duty to eat your fellow man, this will not be recognized as “religious” by the European Court of Human Rights in Strasbourg. If you proclaim that you have to wage religious war against the enemies of God, this is not protected “religion.” If we follow Jansen we cannot accept as “religion” what violates the freedom of movement of others. We must acknowledge that civilization is evolving and blind spots of former times now seem to stand in broad daylight. Is that not part of what we call “Enlightenment”? Perhaps Frances Raday is right and not only are human rights a “product” of the shift “from a religious to secular state culture at the time of the Enlightenment,” but also, the Enlightenment is still the background culture against which we have to understand human rights (Raday 2003: 663).

### A Debate in the Dutch Senate

That brings us to a contemporary discussion around the interpretation of religion and freedom of religion: the matter of unstunned ritual slaughter. With regard to the suffering of non-human animals there clearly is an evolution of ideas that cannot escape us. The only thing we have to discover now is *what consequences* to draw from these new insights. That is what the discussion is about. And here we have on the one hand authors like Singer advocating a new morality (Singer 2011), taking

also the lives of non-human animals into consideration, and on the other hand the traditionalists like Oderberg (2000a, 2000b) who think that reference to the way freedom of religion was traditionally understood is of overriding importance.

On December 13, 2011, in the Senate of the Netherlands there was a debate on unstunned animal slaughter (*Eerste Kamer, Bedwelming bij ritueel slachten*, 31571, December 13, 2011). There had already been a discussion in Parliament going on in Dutch society since the summer of 2011 when a legislative proposal was launched by The Party for the Animals (*Tweede Kamer, Lower House of Parliament*, 2009–10, 31 571, nr. 2). This topic gained international attention. BBC News Europe reported: “Dutch MPs effectively ban ritual slaughter of animals. And the religious sensitivity was spelled out with the words:

The Dutch lower house of parliament has passed a law effectively banning the ritual slaughter of animals, in a move condemned by Muslim and Jewish groups. The legislation states that all animals must be stunned before being killed. But the Islamic *dhabiha* and Jewish *shechita* methods of ritual slaughter require them to be fully conscious. (BBC News 2011)

The Party for the Animals (a political party founded in 2002 having two seats in Dutch Parliament) suggested prohibiting the practice of unstunned ritual slaughter in this country. Under the new law, pre-slaughter stunning of animals would become obligatory for all forms of slaughter.

On June 28, 2011 in the lower house of the Dutch Parliament an overwhelming majority of 116 against 30 votes opted in favor of the bill. But only a few months later, on December 14, 2011 the Dutch Senate decided to freeze its vote against the ban on unstunned ritual slaughter. This was done after Jewish and Muslim groups had campaigned, saying that there is no evidence animals suffer more from ritual slaughter than in ordinary abattoirs. Moreover, and this is what concerns us here, they claimed that a prescription of stunning before slaughter would compromise the freedom of religion. For the moment, the discussion in the Netherlands may have come to a halt.

Yet the question is: will this be the final word? One may doubt that. It seems the die has been cast. It is very likely this discussion will be reopened, not only in the Netherlands, but also in other countries where animal welfare is a cause for increasing concern of the public. Here I will focus on the latest discussion on this matter, that is, the discussion in the Senate.

It was interesting to see all those accomplished legal scholars, struggling with moral questions that, somehow, their legal training had not quite prepared them for.

On the basis of the development around animal rights it seems not unreasonable to speak of a new moral principle to heed the interests of non-human animals (Rachels 1991 Regan 1983; Salt 2012). It cannot be the case that this moral development has no repercussions for the way we interpret “religion.” We now interpret (and must interpret) “religion” in the light of fundamental moral principles (although we still have to inquire into the nature of those principles).

Article 13 of the Treaty of Lisbon (signed by the EU member states on December 13, 2007, and entered into force on December 1, 2009) states that animals are “sentient beings.” This is the vindication of an insight formulated by John Stuart Mill (1806–73) in *Utilitarianism* (1863) that “the whole sentient creation” deserves our attention from a moral point of view (Mill 1992: 123). That does not make non-human animals completely equal to human animals. It does not annul “freedom of religion” completely as alarmist voices want us to believe, nor does it make freedom of religion totally subservient to animal welfare. And finally it does not place the interests of animals above the interests of humans. These are all common misinterpretations of the situation we have to deal with. It does no more than state that the concept of “religion” in the legal sense cannot stay fixed. “Present day religion” is something different from religion in medieval times. The judiciary and the legislature simply cannot ignore that (Cliteur 2009).

But having said that, we still have no clear-cut criteria to decide how to interpret religion in a present day context. Can we say more than that religion has to be “morally acceptable”? That it may not violate “the freedom of movement of others” (Jansen 2011: 198)? That people may not use “the Bible for harm” (Friedman and Dolansky: xii)? And if they do, this is “misuse”?

In my view we can. We can be more specific and we must be more specific. It is possible and necessary to articulate some principles that may serve as guidelines in the interpretation of present day religion.

In what follows I will try to present some guidelines for this interpretation of the concept of “religion” in a legal context.

### **First Principle: No Cruelty or Violence**

To identify principles that may guide us with regard to what can be acknowledged as “religion” it may be helpful to reflect on some of the examples considered very “religious” and pious in ancient times and nowadays usually rejected as “caricatures,” “perversions” or “misuse” of religion (“religion hijacked” for political purposes).

Prominent examples seen as manifestations of religious piety in ancient times but nowadays rejected in horror are Abraham being prepared to offer his son (Delaney 1998; Kretzmann 2001; Cliteur 2010), the burning of witches (Lehmann 1988) and the military expeditions (crusades) stimulated by the pope in Rome (Phillips 2009). We know that those activities were experienced by contemporaries as undoubtedly “religious” although many of us cannot see them that way in our own time. If that is the case it may be helpful to raise the question: *why* can we not see these practices as religious anymore? A provisional answer to that question is: because we consider these practices as immoral. That is undoubtedly true, but at the same time it may be enlightening to throw up the question *why* these acts are nowadays considered to be immoral (although highly pious in previous epochs)? Answering this question cannot be too difficult. In all three examples we recognize

a common thread: violence. Why do we not accept the sacrifice of children, the waging of war in the name of God and the burning of witches? What is wrong with these things? Is not, at least partly, what we find revolting in these practices that there is a clear tendency to violence and cruelty? Could we not formulate the essence of modern civilized values as the attempt to gradually diminish violence and cruelty from this world?

This is not to endorse a Whig view of the history of the West or the adoption of a historical determinism annex belief in "linear progress." What it is, is to state the obvious: that man must create a world that is a better place for everyone, also for non-human animals. That ambition of the Enlightenment as implemented in the nineteenth century in works such as Lecky's *History of European Morals from Augustus to Charlemagne* (1869) and his *History of the Rise and Influence of Rationalism in Europe* (1865) is still on the agenda. As J.B. Bury demonstrates in his *The Idea of Progress: An Inquiry into its Origin and Growth* (1920) working for progress is not a shallow or naive ideal. Peter Singer's *The Expanding Circle* (1981), *One World: The Ethics of Globalization* (2002), and *Animal Liberation* (1975), are in that tradition.

According to the psychologist Steven Pinker (b. 1954) in his book *The Better Angels of Our Nature: Why Violence has Declined* (2011) there is moral progress in the sense that our times are less violent than foregoing ages (which presupposes, of course, that suffering is a great evil, Pinker 2011). There are many examples of practices that have died out in the cultural evolution of mankind and which have to do with violence. Think of public executions. Everyone who has read some literature of seventeenth-, eighteenth- and nineteenth-century authors knows about the sometimes vivid descriptions of public executions in Europe. On October 13, 1660 Samuel Pepys (1633–1703) noted in his *Diary*: "I went out to Charing Cross, to see Major General Harrison hanged, drawn and quartered – which was done there – he looking as cheerfully as any man could in that condition" (Rivlin 2002: 213).

### Second Principle: No Harm to Others

But there is more. If we compare some of the manifestations professed to be "religious" by some believers and denied that status by others, there seems to be the problem that some people decide about other people's fate. The harm being perpetrated is not "harm to self," but "harm to others" (Feinberg 1987, 1989). When Deuteronomy 13:6–11 instructs us to stone to death our own "brother," "daughter" or "wife" if they engage in illicit religious ceremonies this sounds very "universal," as if every single member of the community has the same chance to fall victim to these prescripts. But the social reality is different. It is the weaker members of the community that are being sacrificed to whip the whole community into submission to a few strong alpha males: the "community leaders" (Benson and Stangroom 2009; Mernissi 1992; Manji 2011; Cliteur 2011).

It may be illuminating also to refer to the discussion about anesthetics and inoculation. Clergymen (and medical men inspired by the clergy) once regarded vaccination of humans as, Bertrand Russell (1872–1970) relates, “bidding defiance to Heaven itself, even to the will of God” (Russell 1935: 104). In 1885, when there was a severe outbreak of smallpox in Montreal, the Catholic part of the population resisted vaccination. As one priest said: “If we are afflicted with smallpox, it is because we had a carnival last winter, feasting the flesh, which has offended the Lord” (ibid.). Natural disasters as a punishment of God for the sins of mankind is one of the most common arguments to make sense out of the manifest cruelty of nature. How to reconcile this with the idea of an omnipotent and benevolent deity?

Another discussion arose after the discovery of anesthetics. When James Young Simpson (1811–1870) in 1847 recommended their use in childbirth, the clergy reminded him that God said to Eve: “In sorrow shalt thou bring forth children” (Genesis 3:16). Russell comments: “And how could she sorrow if she was under the influence of chloroform?” (ibid.).

A discussion ensued because Simpson met his adversaries with new theological arguments. He advanced that there was no harm in giving anesthetics to *men* because God had put Adam in a deep sleep when he extracted Eve from the rib of man. According to the ecclesiastics this only saved men and not women – so the ban on the use of anesthetics in childbirth should remain intact.

Why does this discussion strike us as absurd and unsympathetic? As a first step to answer that question let us now suppose someone would decide *for himself* not to have himself inoculated against a deadly disease because he puts his trust in God. Should the state allow this to happen? In that situation there is no “harm to others,” but “harm to self.” Here, as John Stuart Mill famously stated in his *On Liberty* (1859), there are strong reasons for the state *not* to interfere. In this case individual autonomy should be our loadstar. Whoever freely chooses not to take measures against his own suffering is free to do so. Harm to self should be allowed. At least in the case of persons fully conscious of that they decide. But the example of anesthetics during childbirth is not of that category. Here *men* decide for *women* that anesthetics is against the word (and therefore will) of God. And here we may say: let women decide for themselves. Or even better: let every individual decide for him/herself.

### Third Principle: Equality

That brings me to a third principle that may be helpful in deciding what practices can be accepted as “religious.” To gauge the significance of that third principle an example may be helpful. On December 5, 1955 Martin Luther King, Jr. (1929–1968) delivered his famous speech to the Montgomery Improvement Association about Rosa Parks (1913–2005), the woman who refused to give up her place in the bus on behalf of a white person (King 2006). King was an impressive speaker. In his characteristic style he castigates the authorities who arrested and carried to jail

“one of the finest citizens in Montgomery” because “she refused to get up to give her seat to a white person” (King 2006: 516). This protest cannot be wrong, King says. And then he presents an interesting argument:

If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong. If we are wrong, Jesus of Nazareth was merely a utopian dreamer that never came down to earth. (King 2006: 518)

Martin Luther King may have been a great orator. But that does not *eo ipso* mean he was a clear thinker. Suppose some male chauvinists or misogynists would challenge Martin Luther King and say: “How can you be so sure that God is on the side of Rosa Parks? Did not God create man and women? And did he not in His Book several times proclaim that man is the master of the household or – which comes to the same thing – a man the master of his woman?”

The male chauvinists could back up their ideas by references to God’s Word, in particular some expressions by St. Paul. In 1 Timothy 2 Paul admonishes women to “dress themselves modestly and decently in suitable clothing.” They should not have their hair braided. “Let a woman learn in silence with full submission,” St. Paul says and continues:

I permit no woman to teach or to have authority over a man; she is to keep silent. For Adam was not deceived, but the woman was deceived and became a transgressor. Yet she will be saved through childbearing, provided they continue in faith and love and holiness, with modesty. (1 Timothy 2:12–15)

Martin Luther King seems to think that on the basis of the foregoing he can enlist the following institutions and persons for his feminist and anti-racist cause:

1. The Constitution of the United States;
2. God Almighty;
3. Jesus of Nazareth.

He supposes these all agree about the matter before us, but that is a dubious statement, to say the least. The Constitution of the United States has different ideas on equality than God Almighty or Jesus Christ. That is to say: the Constitution of the United States is firmly based on the principle of equality. The Bible (God and Jesus Christ) is not.

#### **Fourth Principle: Religion Subjected to Reasonableness**

So far we have seen that with regard to the interpretation of the concept of religion as it appears in Article 9 ECHR there are at least three principles that may serve as



guiding ideas. To acknowledge “religion” in a human rights context, this “religion” may not:

1. be violent or cruel;
2. harm others;
3. infringe equal concern of interests.

The fourth principle I want to discuss is perhaps the most far-reaching. The question we must address is whether under the present circumstances we may demand from believers claiming the freedom of religion, that their claims are understandable to a nonreligious or differently religious audience. It is the four principles together that may serve as a “canon of interpretation” for the interpretation of “religion” when we come across that word in human rights declarations and constitutions.

These four principles are constitutive for the *legal* (or normative) concept of “religion” in contradistinction to the *social* (or descriptive) concept of religion. Unconsciously and without any methodological basis, authors like Karen Armstrong and Tony Blair followed that canon of interpretation in their discussions with the New Atheists. Their only mistake was that they thought they presented a *description* of an existing reality while what they did was tell us what they think is acceptable.

### Secularism and Animal Welfare

Now let us go back to the discussion on unstunned ritual slaughter in the Dutch Senate. During the debate there were some relatively new political parties that presented fresh and interesting ideas about the controversy of unstunned ritual slaughter. One of those parties was the Independent Senate Fraction (Onafhankelijke Senaats Fractie). Its representative, Professor De Lange, an emeritus professor in chemistry from the Free University in Amsterdam, proffered a principle that has rarely been stated so clearly in the Dutch legislative assembly before. Professor De Lange explained that the considerations of his party with regard to the matter of unstunned ritual slaughter were animated by a principle that he identified as the “laïcité” or “secularism” (Weil 2009; Chirac 2004; Fourest and Venner 2003; Kintzler 2007; Cliteur 2012; Blackford 2012). His party, so De Lange said, operated on the basis of a “strict secular” foundation (Eerste Kamer 2011–12: 39). And by this he meant: Church and state have to be separated. His party respected the constitutionally protected freedom of religion of others, but nevertheless he stated that arguments that are derived from religion in the societal debate should not play a preponderant role. He also proclaimed that religion should have a “private” character.

Furthermore De Lange commented on vegetarianism. This, he said, could not be enforced by the state nor should it be. But that the slaughter of animals should be performed with a minimum of stress and anger for the animals involved would be

a pertinent moral obligation. Unstunned ritual slaughter dated from a period when mankind had no means at its disposal to alleviate the suffering of animals. Now mankind has. And therefore mankind is morally obliged to use these methods (that is, *stunning*). Arguments based on “revelations of a supernatural being” that are by definition impossible to verify, are insufficient to annul that moral obligation. It is for that reason that his faction would not consider those religious arguments valid.

On the basis of these considerations De Lange voted in favor of the proposal to eliminate the religious exception to stun animals before slaughter.

His intervention did not solicit any comments from his colleagues in the political assembly. This is unfortunate, because his specific angle of approaching the problem of ritual slaughter was fresh and potentially far-reaching.

### **Is this Interpretation of Secularism not too Strict?**

But perhaps his statements were too bold to be accepted in the form he stated them. Does, for example, the principle of the secular state (Blackford 2012) entail that religious arguments are no longer admissible in politics? Would not that go too far? Nevertheless, De Lange is right when he says that a serious disadvantage of religious arguments (that is, arguments that are purely religious and do not make an apologetic that is independently persuasive) is that they will not convince an auditorium that is composed of listeners with a diverse religious and nonreligious background. So in political assemblies in pluralist societies (as most societies are nowadays, especially in the Western world) those arguments are little more than an *oratio pro domo*.

In my view the principle of “*laïcité*” should not be interpreted in the sense that religious believers are not allowed to present religious arguments in the public sphere. They have “permission to speak,” so to say. Yet, there is a more restrictive interpretation of the principle of secularism that may be more appropriate in this context. This more restrictive interpretation can hardly be considered as too demanding or put too many constraints on religious believers. It is this more limited interpretation of secularism that seems pertinent here. This limited interpretation means that when the judiciary has to ascertain what is the legal meaning of “religion” in the context of present day human rights declarations and constitutional provisions in modern constitutions, this concept of “religion” has to meet certain standards of reasonableness that at least have a potential to convince us all. Here referring to a private “revelation” is simply not enough. As Thomas Paine (1737–1809) famously explained: if something has been revealed to a certain person, and not revealed to any other person, it is “revelation to that person only” (Paine 1995: 668). The religious believer, claiming that his “religious revelations” should enjoy constitutional protection while it violates basic moral principles of a civilized society must make clear that his religion *deserves* that protection. It should not be revelation “to that person only” or “that group only.”

### The Burden of Proof

A consequence of the requirement stated above is that a religious believer who claims a privilege on the basis of a human right must be able to give some *reasons* why the values that he claims deserve a special status should indeed be worthy of that status.

Formulating such a requirement is certainly a break with a long established tradition that religious believers cannot be required to state the reasons for their religious belief. There is a widely shared understanding that demanding from believers to explain why they hold certain things “holy,” interferes in an undue fashion with their religious freedom. But if we follow Professor De Lange’s approach in the mitigated form as expounded above, I think we may safely require from someone who claims a privileged status for a “religious belief” (and on that basis exemption from the ordinary legal duties that all citizens have to conform to) that at least he provides some reasons why that belief should be classified as “religious” at all.

During the debate in the Dutch Senate this demand was voiced most categorically by the representative of another relatively new political party: Faber van de Klashorst of the Party for Freedom. Faber made clear that she comes from a butcher’s family and accordingly knows what she is talking about. She soberly noticed that everyone with sound moral sense can understand that the ritual slaughtering of a healthy animal that is fully conscious of what is happening is not a very happy affair (Eerste Kamer 2011–12: 26). The animals have to be put on their backside which is an unnatural position for the animal. Instinctively the animal feels what is going to happen and it experiences fear, anger and pain. On average three to five cuts of the carotid artery are necessary before the animal loses consciousness and dies. It can last between half a minute and five minutes before the animal is really dead. Some of the animals with their neck only half cut try to stand up. “This is an awful sight. This should not happen in a Dutch slaughterhouse in 2011” (ibid.). And just as Professor De Lange did, she underscores that the religious prescripts about unstunned ritual slaughter dated from 3,000 to 1,400 years ago. Can we really claim that “best practices” of those times are still the best we can come up with in our times? If we do not accept polygamy, the stoning of adulterous women and the killing of homosexuals as legitimate expressions of religious feeling, why do we do this with unstunned ritual slaughter?

These were all pertinent questions, but her most intriguing remark was in reaction to a colleague in the Senate who spoke for a small Christian party, called the “Union of Christians” (in Dutch: “ChristenUnie”). The representative of the Christian party, Mr. Ester, contended that prohibiting unstunned ritual slaughter would put the freedom of religion under pressure (if not worse). On that occasion Faber interjected that she would like to hear why unstunned ritual slaughter was considered to be a religious prescript (ibid.: 30). Where was this written? Could her colleague show chapter and verse?

As I have made clear during the course of my argument I consider this to be a perfectly reasonable question. If someone demands to be exempted from the obligations of the law (applicable to all citizens alike, one may presume) the least one may expect is that this person is able and prepared to explain *why* he or she should enjoy a privileged status. Only referring to "freedom of religion" without being able or prepared to explain why this has something to do with religion is unreasonable and cannot be accepted in a liberal democratic regime. But the representative from the Christian party reacted as if great injustice would be done to believers if this were standard practice. He called this a "dangerous" demand, because it was not "for them," the members of the Dutch Senate, to judge what is a religious prescript and what is not. Decisions about what is a religious prescript and what not, should be left to the religious community.

As I already indicated in the beginning of this chapter this is a weak argument because the religious community is divided on the issue. Traditionally religious communities had internally identified the normative source of authority. But the problem in a pluralist society is that those sources are in disarray. Who to listen to? To the most conservative elements in the community? Or to the progressive factions? Faber did not accept Ester's answer, and rightly so. She indicated that it was at least a legitimate question whether there was a scriptural basis for the practice to kill the animal while fully conscious. And then she came with the punch line: "but you cannot show me this, because it is not written anywhere" (ibid.: 30). And Faber was right. There is no prohibition of stunning in the Torah. And therefore the claim that unstunned ritual slaughter is a "religious practice" is based on the fact that *some people* claim that this is a religious practice. But because there are also people who claim this practice is *not religious*, the judge has to decide whose arguments should prevail.

At that moment we are back at the beginning of our argument. Once we concede we can argue about what is religious and what is not, both parties have to provide arguments.

Here we see that pluralism has changed the world we live in. Religious communities do not operate as homogeneous entities in a pluralist world but *are themselves* pluralistic. It is difficult, if not impossible, to provide examples of religious prescripts that are universally shared within the religious community, and the necessity of unstunned ritual slaughter is certainly a case in point. Although orthodox believers pretend that there are clear-cut religious prescriptions representative for the religious creed of the group as a whole, this pretense is often mere nostalgia. So whenever someone has the pretense to speak for the group as a whole some skepticism is warranted.

### **A Common Objection: A "Dangerous" Idea**

Now senator Ester and many other people feel uncomfortable with this situation because they have the feeling that respect for religion also comprises respect for the

way people identify their religion. Let me return to the famous definition of religion by William James (1842–1910): “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine” (James 1982: 31). James proclaims the religiousness of a practice is dependent on whether people “apprehend themselves to stand in relation to whatever they may consider the divine.” This leaves broad latitude to the individual believer to determine what he considers “divine.”

This individualist approach is usually argued for as something that is required by “respect for religion” and also, even more mistaken, as respect for “the individual believer.” The approach advocated by Faber, so it is often said, undermines the freedom of religion. It makes the religious freedom completely dependent on the interpretation of that freedom by outsiders, some critics contend, and this certainly animated senator Ester’s reaction to senator Faber’s demand to cite chapter and verse. Religion is put under the tutelage of morals and therewith basically destroyed. Is this not a “dangerous” idea, to quote Ester again?

That may be doubted. My claim is that in the end the approach by Faber is more respectful of religion than the approach by Ester. Let me summarize. We have, basically, two approaches to the concept of religion:

1. Approach Faber: some religious practices are so immoral they cannot be accepted as religious (and accordingly protected by the freedom of religion).
2. Approach Ester: what is religious and what is not, is subjected to the conviction of the individual believer.

The approach of Ester ultimately makes religion dependent on the highly individualist interpretations of sometimes quite idiosyncratic “believers” (like James argued for). It is common to view his approach as respectful to religion. But is it really? It is certainly true that the approach by Faber limits religion in the sense that it excludes some religious practices, but is that really disrespectful? Is it not, on the contrary, more respectful to religion because in the long run it saves religion from deteriorating into quite bizarre religious practices sanctioned by the most reactionary forces within the religious communities?

Again this can best be exemplified by means of an example: the official recognition of a new church and a new religion in Sweden. Recently in Sweden a new church was recognized by the Swedish government, namely the church whose central tenet is the right to file-share (BBC News 2012a). Arguably, this example shows that the approach to religion as advocated by Ester is a dead end.

### **Missionary Church of Kopimism**

The “Missionary Church of Kopimism” (in Swedish *Missionerande Kopimistsamfundet*) claims that the act of sharing information through copying

is akin, if not identical, to a religious service. The kopimists (called *Kopimists* from *copy me*) consider CTRL+C and CTRL+V (shortcuts for copy and paste) as sacred symbols. A kopimist has as the core of his professed religious belief that all information should be freely distributed unrestricted. The kopimists are opposed to the privatization of knowledge in all its forms. As they say: "in our belief, communication is sacred." This is not because they want to promote illegal file-sharing, but because this means the open distribution of knowledge for all. The church also has a spiritual leader who, elated by the recent success of his religious movement, speaks of a "large step." The church was founded by a 19-year-old philosophy student Isak Gerson who seriously hopes that now file-sharing will be given religious protection. In a statement he says:

For the Church of Kopimism, information is holy and copying is a sacrament. Information holds a value, in itself and in what it contains and the value multiplies through copying. Therefore copying is central for the organization and its members. (BBC News 2012a)

Not everyone reacted enthusiastically, but that cannot impress the members of the new religious movement, because the Swedish government agency Kammerkollegiet finally registered the Church of Kopimism as a religious organization after three previous applications had failed.

Now the question is: what is the greatest disaster that may happen to religious freedom as protected in Article 9 of the European Convention on Human Rights? Is the greatest threat to freedom of religion that the legislature and the judiciary put limits to what can count as serious religion? Or is the greatest threat to religion that the religious community can completely determine by itself what is religious and what is not? The example of the Kopimists, in spite of the fact that they do not advocating harming anybody, may still serve as an intimidating example of what can happen with religious freedom.

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